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No. 08-689

In The Supreme Court of the United States

DOUGLAS MICHAEL GUETZLOE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The Florida Fifth District Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Section 106.1439 (**"Electioneering communications; disclaimers"**), Florida Statutes, is unconstitutional as an overbroad intrusion into Petitioner's rights and the First Amendment rights of the rest of the citizenry of the State of Florida to engage in anonymous political speech?

Whether a truncated version of Section 106.1439, Florida Statutes, that merely required the three-word, stand-alone disclaimer, "Paid Electioneering Communication," on all defined "electioneering communications" would be constitutional?

PARTIES TO THE PROCEEDING

The parties to these proceeding are the State of Florida and Douglas Michael Guetzloe.

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OPINIONS BELOW

The trial court's Order Certifying Questions of Great Public Interest is included as **Appendix B**. The opinion of the Florida Fifth District Court of Appeal (5th DCA) is reported and included as **Appendix A**. That court's order denying rehearing is included as **Appendix C**. The Florida Supreme Court's order declining to accept jurisdiction is reported and included as **Appendix D**.

STATEMENT OF JURISDICTION

The decision of the 5th DCA was entered on March 28, 2008 (**Appendix A**). Mr. Guetzloe's motion for rehearing before that court was denied on May 8, 2008 (**Appendix C**). The Florida Supreme Court's order declining to accept jurisdiction was entered on August 22, 2008 (**Appendix D**).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case implicates the First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of

> the people peaceably to assemble, and to petition the Government for a redress of grievances."

This case also implicates the second sentence of Section 1 of the Fourteenth Amendment to the United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In 2004, the State's legislature created the subject statute (Section 106.1439) (**Appendix H**) requiring that a disclaimer be placed on all defined "electioneering communications," prominently stating: "Paid electioneering communication paid for by (*Name and address of person paying for the communication*)." The subject statute makes the failure to include such a disclaimer a misdemeanor of the first degree.

Section 106.011(18), Florida Statutes (**Appendix G**), essentially defines an "electioneering communication" as a written communication within 120 days of an election targeted to reach at least 1,000 households and which is (1) paid for and which (2) refers to

or depicts a clearly identified candidate or ballot issue. There is no limitation in the definition to just those "electioneering communications" which are the functional equivalent of express advocacy. In other words, under Florida law, a person paying for a simple informational communication which expresses no advocacy runs the risk of up to one year's imprisonment if he fails to include all the disclaimers of Section 106.1439 on the face of that communication.

Prior to the March 11, 2006 mayoral election in Winter Park, Florida, Petitioner paid for an electioneering communication that was separately addressed and mailed to several thousand households.

Mr. Guetzloe's electioneering communication contained neither his name, nor his address, nor the three-word phrase "Paid Electioneering Communication."

On or about September 20, 2006, the State filed an Amended Information charging Petitioner with 14 counts of violating Section 106.1439, Florida Statutes, in connection with the above-referred-to electioneering communication.

Count One of the State's Amended Information stated, in pertinent part, the following:

> "LAWSON LAMAR ... CHARGES that DOUGLAS MICHAEL GUETZLOE, ... did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers [*note*: plural tense] required by Florida Statute

106.1439, which was received by DONNA MAE COLADO." (Emphasis supplied). (**Appendix F, App. 28**).

The State never sought to amend the above charging language.

On October 11, 2006, Petitioner moved to dismiss the Amended Information on the grounds that Section 106.1439, Florida Statutes, was unconstitutional. (**Appendix E**).

On November 1, 2006, Petitioner moved to dismiss Counts 2 through 14 of the Amended Information on the grounds that the act of producing one "electioneering communication" that is later duplicated, individually addressed and mailed to separate persons is one act and one crime, not a separate act and a separate crime for each person to whom it is addressed and mailed.

On November 14, 2006, Petitioner's two motions were denied by the trial court.

Upon denial of his motions, Petitioner changed his plea from not guilty to nolo contendere. The trial court, then, adjudicated Petitioner guilty on all 14 counts of the Amended Information and sentenced him to, among other things, 60 days in jail and three years probation.

Petitioner, then, moved for entry of an order certifying questions of great public interest. (**Appendix B**). The motion was granted and Petitioner appealed to the Florida Fifth District Court of Appeal (5th DCA).

On March 28, 2008, the 5th DCA entered its opinion (**Appendix A**) affirming Mr. Guetzloe's conviction on Count One, reversing his conviction on Counts 2 through 14, and remanding the case to the trial court for re-sentencing (where Mr. Guetzloe now sits awaiting re-sentencing). The 5th DCA's opinion side-stepped the issue of the constitutionality of Section 106.1439 by (incorrectly) finding that Mr. Guetzloe had been prosecuted solely for failing to place the three words "Paid Electioneering Communication" on his mailer. Without any analysis or discussion of the constitutionality of requiring those three words be printed on the face of a defined "electioneering communication," the 5th DCA rebuffed Mr. Guetzloe's constitutional challenge to Section 106.1439.

Mr. Guetzloe timely requested rehearing (which was denied) (**Appendix C**) and timely sought discretionary review by the Florida Supreme Court, which was also denied. (**Appendix D**).

Following that August 22, 2008 denial of discretionary review, Mr. Guetzloe filed the instant petition for certiorari.

REASONS FOR GRANTING THE WRIT

1.

The trial court erred in not dismissing the charges against Mr. Guetzloe since Section 106.1439 ("Electioneering communications; disclaimers"), Florida Statutes, is unconstitutional for the reasons set out in Section II of this Court's opinion in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-43, 115 S.Ct. 1511, 1516-17, 131 L.Ed.2d 426 (1995), as an impermissible infringement on the right of Mr. Guetzloe and others to engage in anonymous political speech.[1]

Petitioner moved to dismiss the charges against him on the grounds that Section 106.1439 was unconstitutional as an overbroad intrusion into a citizen's

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[1] While in the process of preparing this petition, the undersigned became aware of a 33-page temporary-injunction order recently entered by District Judge Stephan P. Mickle of the Northern District of Florida in *Broward Coalition v. Browning*, Case No. 4:08-cv-00445 (N.D. Fla. October 29, 2008), temporarily enjoining the State of Florida from enforcing its laws (including Section 106.1439) concerning "electioneering communications." In his order Judge Mickle discusses in detail each of this Court's decisions discussed herein. On page 9 of his Order, Judge Mickle summarizes the basis for his ruling as follows:

> "Florida electioneering communication laws regulate virtually *all* political speech about ballot issues and candidates; the Supreme Court has never recognized a compelling interest that allows such a wide-open regulation. Thus, Plaintiffs are substantially likely to succeed on their claims that Florida electioneering communication laws are unconstitutional, both as applied to them and on their face."

right under the First Amendment to engage in anonymous political speech since Section 106.1439 expressly requires that all defined "electioneering communications" must disclose on their face the "name and address" of the person paying for the communication.

In 1995, nine years prior to Florida's creation of Section 106.1439, this Court decided the case of *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (*McIntyre*). *McIntyre* dealt with whether a state could prohibit anonymous, political speech. Specifically, *McIntyre* dealt with whether states could require statements of authorship on independent political advertisements. In *McIntyre* this Court struck down an Ohio statute used to convict Mrs. McIntyre of handing out anonymous leaflets against a school tax proposal. The Ohio statute required that the name and address of the person authoring such leaflets be disclosed on the face of the leaflet. Mrs. McIntyre's leaflets did not contain those items. This Court held that "independent communications by an individual" embodied the essence of the First Amendment and, as such, anonymous, core political speech could not be inhibited by laws requiring disclosure of the author's "name and address" on the face of the communication. *Id.* 514 U.S. at 347, 115 S.Ct. at 1519.

As background, this Court discussed the early history of this nation and how, for example, the anonymous speech of "Junius" lent support to our revolutionary cause. *Id.* 514 U.S. at 343, 115 S.Ct. at

1517. This Court further discussed how even the Federalist Papers were published under pseudonyms such as "Cato," "Brutus," "Publius," and "the Federal Farmer." *Id.* 514 U.S. at 347, 115 S.Ct. at 1159.

This Court then concluded:

> "**[12]** Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. See generally J. Mill, On Liberty and Considerations on Representative Government 1, 3-4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *Id.* 514 U.S. at 357, 115 S.Ct. 1524.

Shortly after *McIntyre*, a declaratory relief action was brought in state court in Florida challenging the "name and address" disclosure requirements in the then Florida statute regulating defined "independent political advertising" (i.e. essentially, independently-sponsored, express advocacy of a candidate or ballot issue). The case reached the Florida Supreme Court. In its opinion in *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998) (*Doe*), the Florida Supreme Court judicially truncated the disclaimer/disclosure requirements of that statute, declaring the "name and

address" disclosure requirement to be a violation of the First Amendment, but leaving intact the requirement that all such independent, express advocacy contain the disclaimer "Paid Political Advertisement." The Florida court specifically held as follows:

> "FN17. To comport with the First Amendment, the last sentence in section 106.071(1) must be truncated to read: "Any political advertisement paid for by an independent expenditure shall prominently state "Paid political advertisement."" *Doe*, at 935.

In 2004, Florida's legislature created the statute Mr. Guetzloe was convicted of violating. It imposes criminal penalties on persons paying for defined "electioneering communications" who fail to disclose on the face of the communication the "[n]ame and address of person paying for the [electioneering] communication," and the disclaimer "Paid Electioneering Communication."

In other words, the Florida legislature sought to criminalize in 2004 the exact same behavior this Court had held nine years earlier in *McIntyre* to be "an honorable tradition of advocacy and of dissent."

Florida's definition of "electioneering communication" is not limited to just those ads which are the functional equivalent of express advocacy. Rather, Florida's definition of "electioneering communication" encompasses all communications within 120 days of an election which are [1] "paid for" and which

[2] refer to or depict "a clearly identifiable candidate for office or contains a clear reference indicating that an issue is to be voted on at an election, without expressly advocating the election of defeat of a candidate or the passage or defeat of an issue." *See*, Section 106.011(18), Florida Statutes. (**Appendix G**).

The Ohio statute struck down in *McIntyre* is much narrower in scope than Section 106.1439 since the Ohio statute only governed communications that expressly advocated a particular position on a candidate or ballot issue. Here, Section 106.1439 essentially covers all communications within 120 days of an election which merely refer to or depict a particular candidate or ballot issue.

In Section II.B. of its recent opinion in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) (*Leake*), the Fourth Circuit summarized this Court's prior decisions defining the boundary line on permissible state regulation of independent political speech. *Leake* pointed out that in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*Buckley*), this Court stated "campaign finance laws may constitutionally regulate only those actions that are unambiguously related to the campaign of a particular candidate." *Leake*, at 281. *Leake* went on to say that in *McConnell v. Federal Elections Commission*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (*McConnell*), this Court clarified that demarcation line with regard

to "electioneering communications" by saying that government can regulate electioneering communications which are "the functional equivalent of express advocacy." *Leake*, at 282. And in *Federal Elections Commission v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (*WRTL*), this Court defined the phrase "functional equivalent of express advocacy" to mean that a communication falls with that definition "only if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Leake*, at 282.

Clearly, the criminal prohibitions in Section 106.1439 and Florida's definition of "electioneering communication" are much broader than what is permissible under the above decisions of this Court discussed in *Leake*.

As an aside, the 2004 legislature placed additional restrictions on those wishing to engage in defined "electioneering communications." For example, an individual making defined "electioneering communications" must also file periodic expenditure reports with the proper reporting agency by the 4th, 18th and 32nd day prior to a primary election and by the 4th, 18th, 32nd, and 46th day prior to a general election for expenditures aggregating in excess of $100. Under Florida law, failure to accurately and timely report such expenditures subjects the person paying for the communication to possible

imprisonment – such as Mr. Guetzloe faces here. These criminal disclosure, disclaimer and reporting requirements have created a legal minefield for those wishing to publicly discuss candidates or ballot issues (without necessarily advocating a position thereon). This maze of regulations effectively deters most private individuals, like Mr. Guetzloe, from engaging in protected, core, political speech – or, as stated in *Leake*,

> "Campaign finance regulation has been termed baffling and conflicted. It is an area in which speakers are now increasingly forced to navigate a maze of rules, sub-rules, and cross-references in order to do nothing more than project a basic political message. Only those able to hire the best team of lawyers may one day be able to secure advisory opinions, or otherwise figure out the myriad relevant rulings with any degree of assurance that they will escape civil and criminal sanctions for their speech." *Leake*, at 296.

Other circuits have, as in *Leake*, followed this Court's *McIntrye* decision to invalidate laws similar to Section 106.1439.

For example, in the case of *ACLU v. Heller*, 378 F.3d 979 (9th Cir. 2004) (*Heller)*, the Ninth Circuit struck down a Nevada statute that made it unlawful "for any person to publish any material related to an election, candidate or any question on a ballot unless that material or information contains," among other things, "[t]he name and mailing or street address of

each person who has paid for or who is responsible for paying for the publication . . . "

The *Heller* court accentuated the fact that requiring the name and address of the materials' proponent be displayed on the face of the material itself (rather than being reported after the fact to an appropriate governmental agency) was what made the statute objectionable. It ruled that such required disclosures *on the face of the materials themselves* are content-based, direct proscriptions of political speech, i.e. "If certain content appears on the communication, it may be circulated; if the content is absent, the communication is illegal and may not be circulated." *Heller*, at 992.

As an aside, some authorities have stated that the Ninth Circuit's interpretation of *McIntyre* in *Heller* cannot be reconciled with the Seventh Circuit's interpretation in *Majors v. Abell*, 361 F.3d 349 (7th Cir. 2004) (*Majors*). In *Majors*, the Seventh Circuit upheld the validity of an Indiana law requiring political advertising to identify the person paying for the ad. One authority has summarized the conflict between the two circuits as follows: "The Ninth Circuit did make some attempt to distinguish its ruling from that of Majors, but the two opinions are openly at odds with each other in several ways." *Theoretical Splits and Consistent Results on Anonymous Political Speech: Majors v. Abell and ACLU of Nevada v. Heller*, 50 St. Louis U.L.J. 925, 928 (Spring, 2006).

In summary, Section 106.1439 is unconstitutional for the reasons set forth in Section II of this Court's opinion in *McIntrye*.

Moreover, Section 106.1439 is unconstitutionally overbroad for the additional reason that it attempts to regulate independent, political speech that is neither "express advocacy" nor the "functional equivalent of express advocacy."

2.

The criminal sanctions imposed by Section 106.1439 ("Electioneering communications; disclaimers"), Florida Statutes, on all defined "electioneering communications" that fail to bear the three-word disclaimer, "Paid Electioneering Communication," is unconstitutional for the additional reason that this Court has "never recognized a compelling interest in regulating ads ... that are neither express advocacy nor its functional equivalent." *Federal Elections Commission v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, 127 S.Ct. 2652, 2671, 168 L.Ed.2d 329 (2007).

The question as to the constitutionality of Section 106.1439 certified (**Appendix B**) by the trial court to the 5th DCA was as follows:

> "Whether Section 106.1439 ("Electioneering Communication"), Florida Statutes, is unconstitutional as being an overbroad intrusion into the Defendant's First Amendment rights and the First Amendment rights of the rest of the citizenry of the State of Florida to engage in anonymous political speech."

There was no similar question certified as to the constitutionality of a stand-alone disclaimer requirement for the three words "Paid Electioneeing Communication" on all defined "electioneering communications."

Consequently, on appeal to the 5th DCA Mr. Guetzloe argued Section 106.1439 was unconstitutional *in toto,* based on what this Court stated in Section II of *McIntyre*.

In his initial brief to the 5th DCA, Mr. Guetzloe argued, as an aside, that truncating Section 106.1439 by judicially eliminating the name and address disclosure requirements and leaving only the three-word disclaimer requirement, "Paid Electioneering Communication," was inappropriate because the discretion to judicially truncate a statute may be exercised only so long as the statute as so limited is complete in itself and consistent with the stated or obvious legislative intent. He further argued that the obvious legislative intent behind Section 106.1439 was to require the person paying for a defined "electioneering communication" to reveal his identity on the face of the communication – something which *McIntyre* expressly forbids.

Guetzloe also argued that, in the instant case, requiring a defined "electioneering communication" contain the three-word disclaimer, "Paid Electioneering Communication," would still be a content-based restriction on pure political speech which would serve no legitimate (much less compelling) state interest since the two elements that define a particular communication as being an "electioneering communication"

are, one, that the communication be "paid for" and, two, that the name of a candidate or a ballot issue appear on the face of the communication and that both those elements would already be self-evident from the communication itself.

In response before the 5th DCA, the State argued Section 106.1439 was constitutional *in toto*. Moreover, both at trial and on appeal, the State proffered no compelling state interest separately justifying a three-word, stand-alone, disclaimer requirement, "Paid Electioneering Communication," on defined "electioneering communications." Nor did the State go through any analysis as to why or how judicially truncating Section 106.1439 was appropriate.

In its March 28, 2008 opinion (**Appendix A**), the 5th DCA side-stepped the issue of whether the "name and address" requirements contained in Section 106.1439 were constitutional. It did so by (incorrectly) finding that Mr. Guetzloe had been prosecuted solely for having failed to include the three-word disclaimer, "Paid Electioneering Communication," on the face of the subject mailer.

The 5th DCA likewise side-stepped analyzing whether judicially truncating the subject statute was appropriate or whether there was a compelling state interest separately justifying the criminalization of his failing to include the three-word disclaimer on his mailer, by (incorrectly) holding that there was –

> "no substantive difference between the phrase 'paid political advertisement,' approved in

> *Mortham,* and 'paid electioneering communication' found in section 106.1439(1). Accordingly, Guetzloe was required under section 106.1439 to disclose that the mail-out was a "Paid electioneering communication," and failure to do so subjected him to prosecution." *Guetzloe v. State*, 980 So.2d 1145, 1147 (Fla. 5th DCA 2008).

To the contrary of the 5th DCA's (incorrect) statement that "[t]here is no substantive difference between the phrase 'paid political advertisement,' approved in *Mortham*, and 'paid electioneering communication' found in section 106.1439," there *is* a significant, substantive difference between requiring a "Paid Political Advertisement" disclaimer and requiring a "Paid Electioneering Communication" disclaimer – that difference lying in a comparison of the definitions under Florida law of the two phrases, "political advertisement" and "electioneering communication."

Under Florida law, the "paid political advertisements" discussed in the case of *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998) (*Mortham*), are, by definition, advertisements "which expressly advocate[ ] the election or defeat of a candidate or the approval or rejection of an issue." Section 106.011(17) (**"Definitions"**), Florida Statutes (2006). (**Appendix G**). Under Florida law, "paid political advertisements" are, by definition, "express advocacy" ads. By contrast, an advertisement is an "electioneering communication" under Section 106.011(18) (**"Definitions"**),

Florida Statutes (2006), (**Appendix G**) if it merely mentions or depicts a candidate or issue, without necessarily advocating a position as to that candidate or issue. In other words, while this Court has recognized a compelling interest in regulating Section 106.011(17) "paid political advertisements," it has *never* recognized a similar compelling interest in regulating the broad category of ads falling within Section 106.011(18)'s definition of "electioneering communications." As such, Section 106.1439 is overbroad since it sweeps up not only "electioneering communications" that are functional equivalents of "express advocacy," but also "electioneering communications" that merely mention a candidate or issue without advocating a position.

Finally, it serves *no* legitimate (much less compelling) state interest to require a three-word, standalone disclaimer, "Paid Electioneering Communication," on defined "electioneering communications," since the defining characteristics of a "Paid Electioneering Communication" would already be self-evident from the communication itself – such as that the communication clearly refers to or depicts a candidate or ballot or that the communication was "paid for."

By way of example, how could an "electioneering communication" reach someone through the mail if someone else had not "paid for" it to be copied, printed, or mailed?

Therefore, the benefit of requiring a three-word disclaimer of what is already self-evident about a

communication cannot outweigh the burden of criminalizing speech made without such a disclaimer.

Moreover, such a meaningless three-word disclaimer is still a "content-based" restriction on pure political speech. *See, e.g., Heller* at 992. And, as such and because this Court has *never* recognized a compelling interest in requiring such a meaningless, self-evident disclaimer on the face of a defined "electioneering communication," a stand-alone criminal sanction for having failed to include such a meaningless, three-word disclaimer is unconstitutional.

As stated above, in *WRTL* this Court held the following:

> "Because BCRA [Bipartisan Campaign Reform Act] Section 203 burdens political speech, it is subject to strict scrutiny. Under strict scrutiny, the *Government* [*note*: the Court's emphasis] must prove that applying BCRA to WRTL's ads furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL,* 127 S.Ct. at 2664.
>
> "This Court has *never* [*note*: emphasis supplied] recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent." *WRTL,* 127 S.Ct. at 2671.

In other words, when government seeks to regulate political speech, such as by enacting Section 106.1439, it must do so only to further a compelling interest. And, as stated in *WRTL*, this Court has

never recognized a compelling interest in regulating ads (such as ones included in Florida's definition of "electioneering communication") which are neither express advocacy nor its functional equivalent. Here, the case against the constitutionality of requiring such a three-word disclaimer on all defined "electioneering communication" is even stronger since the State has never articulated an interest, much less a compelling interest, arguably furthered by a stand-alone "Paid Electioneering Communication" disclaimer requirement on the broad category of ads falling within Florida's definition of "electioneering communications."

As an aside, the 5th DCA incorrectly found that Mr. Guetzloe was charged solely with failing to include the three-word disclaimer, "Paid Electioneering Communication," on the face of the subject mailer. To the contrary Count One of the First Amended Information (**Appendix F**) states, in pertinent part, the following:

> "LAWSON LAMAR ... CHARGES that DOUGLAS MICHAEL GUETZLOE, ... did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers [*note*: plural tense] required by Florida Statute 106.1439, which was received by DONNA MAE COLADO." (Emphasis supplied).

The State never moved to amend the First Amended Information to limit the charge to just Mr. Guetzloe's failure to include the three-word

disclaimer, "Paid Electioneering Communication." Moreover, as noted in the charge above, the clear wording of the State's accusation against Guetzloe was that he failed to include the "disclaimers" [*note*: plural] required by Section 106.1439, not just that he failed to include the "Paid Electioneering Communication" disclaimer [*note*: singular]. In fact, the words "Paid Electioneering Communication" nowhere appear in Count One. Finally, the constitutional question certified to the 5th DCA by the trial court shows that the issue of constitutionality was as to Section 106.1439 as a whole, not just as to the disclaimer requirement "Paid Electioneering Communication." (**Appendix B**).

Why the 5th DCA chose to re-write the history of the case and the consequent issues involved on appeal is a mystery. But, clearly by doing so the 5th DCA hoped to avoid the constitutional issues addressed above.

CONCLUSION

Based upon the reasons set forth herein, Mr. Guetzloe respectfully requests that this Court grant his petition and accept his case for review.

Respectfully submitted,

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APPENDIX A

980 So.2d 1145

District Court of Appeal of Florida, Fifth District.
Douglas Michael **GUETZLOE**, Appellant,
v.
STATE of Florida, Appellee.
No. 5D07-44.

March 28, 2008.
Rehearing Denied May 8, 2008.

Frederic B. O'Neal, Windermere, for Appellant.

Bill McCollum, Attorney General, Tallahassee, and Rebecca Roark Wall, Assistant Attorney General, Daytona Beach, for Appellee.

COHEN, J.

Douglas Guetzloe appeals the denial of two motions to dismiss an amended information charging Guetzloe with 14 counts of violating section 106.1439, Florida Statutes (2004), Florida's Electioneering Communication Statute. We affirm in part and reverse in part.

The Facts

The charges resulted from the 2006 mayoral election in the City of Winter Park. Just before the election, Mr. Guetzloe prepared and mailed out a four-page packet, which purportedly documented a neighborhood dispute and subsequent prosecution of a candidate running for reelection for the position of

Mayor of Winter Park, Florida. The mayor allegedly deposited dog excrement on a neighbor out walking his dogs. The mail-out included a police report, victim's statement, and pretrial diversion contract. Mr. Guetzloe's effort at the quintessential smear campaign went to over five thousand households and occurred without the knowledge or consent of the candidates.[1] Following the election, the disclosure form required by section 106.071 was filed identifying Guetzloe as the source of the mail-out.

Procedural History

The State charged Guetzloe with 14 counts of violation of section 106.1439, each a misdemeanor of the first degree. Guetzloe moved to dismiss the prosecution, claiming that the statute was an overbroad restriction against anonymous political speech. Further, he argued that the statute allowed for only one unit of prosecution. At the hearing on the motion to dismiss, the State stipulated that the prosecution of Guetzloe stemmed from his failure to include the "paid electioneering communication" disclaimer, and was not based upon failure to include his name and address on the electioneering communication. Those motions were denied and Guetzloe entered a no contest plea reserving the right to appeal. Pursuant

[1] The mayor's opponent filed an affidavit crediting loss in the subsequent election to Mr. Guetzloe's mail-out, which appears to have been a misguided and unsuccessful effort to defeat the mayor's reelection.

to Florida Rule of Appellate Procedure 9.160, Guetzloe moved for entry of an order certifying questions of great public importance. The county court, in and for Orange County, granted that motion, certifying two questions of great public importance;

> 1. Whether Section 106.1439, Florida's Electioneering Communication Statute, is not [sic] an overbroad restriction against anonymous political speech.
>
> 2. Whether Section 106.1439 allows the State to charge separate counts for each person to whom an electioneering communication is addressed, mailed, and received.

This court granted certification. On appeal, Guetzloe challenges the constitutionality of the statute, in toto.

Analysis

For the reasons set forth below, we restate the first question presented. Section 106.1439(1) provides:

> Any electioneering communication shall prominently state: "Paid electioneering communication paid for by (Name and address of person paying for the communication)."

[1] At issue is whether the "name and address" mandate is severable from the "paid electioneering communication" requirement and if so, whether the statute as redacted constitutes an overbroad restriction of anonymous political speech. Section

106.011(18)(a) defines "electioneering communication" as a paid expression that:

> 1. Refers to or depicts a clearly identified candidate for office or contains a clear reference indicating that an issue is to be voted on at an election, without expressly advocating the election or defeat of a candidate or the passage or defeat of an issue.
>
> 2. For communications referring to or depicting a clearly identified candidate for office, is targeted to the relevant electorate. A communication is considered targeted if 1,000 or more persons in the geographic area the candidate would represent if elected will receive the communication.

It is undisputed that Guetzloe's mail-out met the statutory definition and constituted an electioneering communication.

We find the disclosure requirements of section 106.1439 are severable and Guetzloe can be prosecuted for his failure to include "paid electioneering communication" on the mail-out. In *Doe v. Mortham,* 708 So.2d 929 (Fla.1998), the plaintiffs argued that section 106.071(1), was overbroad and infringed upon their First Amendment right to engage in anonymous political speech. That statute required political advertisements paid for by an independent expenditure prominently state Paid political advertisement paid for by (Name and address of person paying for advertisement) independently of any (candidate or committee). The supreme court found that despite the

statute's problematic "name and address" mandate, the generic requirement that all communications be marked with the phrase "Paid political advertisement" in no way violated the right to engage in anonymous political speech.

There is no substantive difference between the phrase "paid political advertisement," approved in *Mortham,* and "paid electioneering communication" found in section 106.1439(1). The disclaimer requirement in the instant case does not violate First Amendment principles. Accordingly, Guetzloe was required under section 106.1439 to disclose that the mail-out was a "Paid electioneering communication," and failure to do so subjected him to prosecution.

The State did not pursue prosecution for Guetzloe's failure to disclose his identity on the mail-out. Having found the statutory provisions severable, we do not need to reach the constitutionality of the "name and address" provision within section 106.1439.

Guetzloe next argues that section 106.1439 allows for only one unit of prosecution and his additional 13 convictions for section 106.1439 violations are barred by double jeopardy, which prohibits multiple punishments for the same offense.

[2][3] In determining the "allowable units of prosecution," courts must look to the criminal activity that the legislature intended to punish. *McKnight v. State,* 906 So.2d 368, 371 (Fla. 5th DCA 2005). In *McKnight,* this court discussed the factors to be

considered by the court in determining allowable units of prosecution. It is a common sense approach, guided by the statutory language, context, similar enactments, and case law.

Applying this common sense approach to the present case, we find that section 106.1439 allows only one unit of prosecution. Guetzloe's original electioneering communication consisted of one mailing, sent to over five thousand households. Section 106.011(18)(a), which defines "electioneering communication" and brings Guetzloe's electioneering communication within the purview of the criminal courts, contemplates that an offender will mail, email, or otherwise distribute substantial numbers of communications. Indeed, the statute uses a figure of 1000 as indicative of targeting. Common sense suggests the legislature did not intend that violation of section 106.1439, which it classified as a misdemeanor, would subject the offender to one year in jail for each of the 1000 communications.

[4] This conclusion is buttressed by the "a/any" test, and the legislature's use of the word "any" in section 106.1439(2): "Any person who fails to include the disclaimer prescribed in this section in *any* electioneering communication that is required to contain such disclaimer commits a misdemeanor of the first degree." (Emphasis supplied.) Under the "a/any" test, use of the word "any" indicates an ambiguity as to the intended units of prosecution, and any doubt as to legislative intent must be resolved by application of the rule of lenity. *Id.* at 372. Under the rule of lenity,

ambiguity in the statute must be interpreted to favor the defendant.

We conclude that double jeopardy bars multiple prosecutions for a single distribution of electioneering communications.

Accordingly, we AFFIRM IN PART, REVERSE and REMAND for resentencing based upon this opinion.

APPENDIX B

IN THE COUNTY COURT IN AND FOR
ORANGE COUNTY, FLORIDA

CASE NO. 06-MM-9313-0

THE STATE OF FLORIDA

vs.

DOUGLAS MICHAEL GUETZLOE, DIVISION 63

Defendant. /

ORDER CERTIFYING QUESTIONS OF GREAT PUBLIC INTEREST

(Filed Dec. 14, 2006)

THIS CAUSE having come on to be heard on the 13 day of December, 2006, on Defendant's unopposed motion pursuant to Rule 9.160 (**"Discretionary Proceedings to Review Decisions of County Courts"**), Fla.R.App.P., to certify the following questions to the Fifth District Court of Appeal of the State of Florida as questions of great public importance:

> Whether Section 106.1439 (**"Electioneering Communication"**), Florida Statutes, is unconstitutional as being an overbroad intrusion into the Defendant's First Amendment rights and the First Amendment rights of the rest of the citizenry of the State of Florida to engage in anonymous political speech.
>
> Whether in a prosecution for an alleged violation of Section 106.1439 (**"Electioneering Communication"**), Florida Statutes, where

> the same electioneering communication is separately addressed and mailed to various persons within a targeted demographic, may a defendant may be charged with a separate offense for each person to whom such communication is addressed and mailed.

The Court having heard argument of counsel and being otherwise fully advised in the premises herein makes the following findings of fact and conclusions of law:

1. Pursuant to Section 7 of ch. 2004-252, Laws of Florida, the State's legislature created the subject statute (Section 106.1439) requiring that a disclaimer be placed on defined "electioneering communication," (*See*, Sections 106.011(18), Florida Statutes), prominently stating: "Paid electioneering communication paid for by (*Name and address of person paying for the communication*." The subject statute makes the failure to include such a disclaimer a misdemeanor of the first degree.

2. Prior to the March 11. 2006 mayoral election in the City of Winter Park, Florida, the Defendant, DOUGLAS MICHAEL GUETZLOE, paid for an electioneering communication that was separately addressed and mailed to several thousand households in Winter Park, Florida.

3. The electioneering communication contained neither the Defendant's name, nor his address, nor the phrase "Paid Electioneering Communication."[1]

4. On or about September 20, 2006, the State charged the Defendant with 14 counts of violating Section 106.1439, Florida Statutes. (*See,* Amended Information, attached hereto as Exhibit 1) in connection with the above-referred-to electioneering communication.

5. On or about October 11, 2006, the Defendant moved to dismiss the Amended Information on the grounds that Section 106.1439, Florida Statutes, was unconstitutionally overbroad. (*See,* Motion to Dismiss, attached hereto as Exhibit 2).

6. On or about November 1, 2006, the Defendant additionally moved to Dismiss Counts 2 through 14 of the Amended Information on the grounds that the act of producing one electioneering communication that is later duplicated, then individually addressed and mailed to separate persons is one act and one crime, not a separate act and a separate crime for each person to whom it is addressed and mailed. (*See,*

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[1] Following the election, however, the Defendant did file with the City Clerk of Winter Park the disclosure form required by Section 106.071 (**"Independent expenditures; electioneering communications; reports; disclaimers"**), Florida Statutes, identifying himself as the person who had paid for the subject communication.

Motion to Dismiss Counts 2 through 14, attached hereto as Exhibit 3).

7. On or about November 14, 2006, Defendant's two motions came on for hearing at which time the Court denied both motions. (*See*, Order of November 14, 2006, attached hereto as Exhibit 4).

8. Subsequent to the denial of those motions, Defendant changed his plea from not guilty to nolo contendere. The Court, then, adjudicated the Defendant guilty on all 14 counts of the Amended Information and sentenced him to, among other things, 60 days in jail and three years probation. (*See,* Order of November 14, 2006 attached hereto as Exhibit 5).

9. To the Court's knowledge and to the knowledge of the parties herein there have been no prior prosecutions in Florida under the subject statute, nor has there been a prior ruling by another Florida court on the issues stated above.

Based on the foregoing the Court hereby CERTIFIES to the Fifth District Court of Appeal of the State of Florida that the orders referenced herein and attached hereto and the above-stated issues are of great public importance.

DONE AND ORDERED in Chambers at the Orange County Courthouse in Orlando, Florida on this 13 day of December, 2006.

/s/ C. Jeffery Arnold
C. Jeffery Arnold,
County Court Judge

Copies to:

Scott Pignone, Esq.
William J. Schaeffer, Esq.
Frederic O'Neal, Esq.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

DOUGLAS MICHAEL
GUETZLOE,

Appellant

v. CASE NO. 5D07-44

STATE OF FLORIDA,

Appellee. /

DATE: May 8, 2008

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Rehearing, Motion for Clarification and Motion for Rehearing En Banc, filed April 14, 2008, is denied.

I hereby certify that the foregoing is
(a true copy of the original Court order.

/s/ Susan Wright
SUSAN WRIGHT, CLERK

[SEAL]

cc: Frederic B. O'Neal, Esq.
Office of the Attorney General, Daytona Beach

APPENDIX D

2008 WL 3896191

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Florida.
Douglas Michael GUETZLOE, Petitioner(s)
v.
STATE of Florida, Respondent(s).
No. SC08-1115.

Aug. 22, 2008.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R.App. P. 9.330(d).

QUINCE, C.J., and PARIENTE, LEWIS, CANTERO, and BELL, JJ., concur.

APPENDIX E

IN THE COUNTY COURT IN AND FOR
ORANGE COUNTY, FLORIDA

CASE NO. 06-MM-9313-0

THE STATE OF FLORIDA

vs.

DOUGLAS MICHAEL GUETZLOE, DIVISION 63

Defendant. /

MOTION TO DISMISS

Pursuant to Rule 3.190(b), Fla.R.Crim.P., Defendant, DOUGLAS M. GUETZLOE ("Guetzloe"), moves this Court to dismiss the First Amended Information filed against him herein by the STATE OF FLORIDA ("the State") on the grounds that the subject statute Defendant is charged with having violated is unconstitutional as being an overbroad intrusion into Defendant's First Amendment rights and the First Amendment rights of the rest of the citizenry of the State of Florida to engage in anonymous political speech.

In support hereof, Defendant would show this Court the following:

1. Pursuant to Section 7 of ch. 2004-252, Laws of Florida, the State's legislature created the subject statute (Section 106.1439) requiring a disclaimer be placed on defined "electioneering communication," [*See*, Sections 106.011(18), Florida Statutes] identifying

the "Name and address of person paying for the [electioneering] communication."

2. As such, Section 106.1439 makes it illegal to for Defendant or anyone else in the State of Florida to engage in anonymous "electioneering communication" in a defined political context.

3. Anonymity of the author of such political speech is protected by the First Amendment to the United States Constitution, for the reasons set out in Section II of the United States Supreme Court's opinion in *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 341-343, 115 S.Ct. 1511, 1516-17, 131 L.Ed.2d 426 (1995). (a copy of Section II of that opinion is attached hereto).

4. In 1998 in the case of *Doe v. Mortham,* 708 So.2d 929 (Fla. 1998), the Florida Supreme Court, relying on *McIntyre*, *supra*, struck the same "name and address" requirement for "political advertisements" under Section 106.071, Florida Statutes, as exist under Section 106.1439, Florida Statutes. There is no reason to believe the Florida Supreme Court would not similarly strike the "name and address" requirements in Section 106.1439 as they have already stricken from Section 106.071.

5. Recently, the Fifth District Court of Appeal specifically held that the *Doe* court's elimination of the "name and address" disclosure requirement in Section 106.071 applied to the instant Defendant herein. *See, Guetzloe v. Florida Elections Commission*, 927 So.2d

942 (Fla. 5th DCA 2006), *review denied*, SC 06-1135 (Fla. September 12, 2006).

6. In light of the holdings in *McIntyre*, *Doe*, and *Guetzloe, supra*, it can be without debate that the requirement in Section 106.1439 that a person paying for electioneering communication must disclose on the communication his name and address is unconstitutional. Additionally, unlike the result in *Doe* the "name and address" requirements should not merely be truncated from the statute. Rather, Section 106.1439 should be held unconstitutional *in toto* since the only remaining requirement after such a truncation would be that an electioneering communication contain the phrase "Paid electioneering communication." Such a meaningless disclosure would serve no legitimate state interest, especially when weighed against the burden on Free Speech. Specifically, the two elements defining a particular communication as "electioneering communication" are, one, that the name of a candidate or issue appear on the communication and, two, that the communication be paid for. Both those elements would already be self-evident from the communication itself (e.g. how could a communication reach someone through the mail if someone else had not paid to have it copied, printed, or mailed?). Therefore, the burden on free speech of requiring such a truncated written disclosure of what would already be obvious does not outweigh the burden of having to include such a disclosure on each such communication.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile delivery to Office of the State Attorney, (407) 836-2489 on this 11th day of September, 2006.

/s/ Frederic B. O'Neal
Frederic B. O'Neal, Esq.
Florida Bar No. 252611
P.O. Box 842
Windermere, FL 34786
(407) 719-6796
FAX (407) 292-5368

514 U.S. 334, 115 S.Ct. 1511

* * *

In dissent, Justice Wright argued that the statute should be tested under a more severe standard because of its significant effect "on the ability of individual citizens to freely express their views in writing on political issues." *Id.,* at 398, 618 N.E.2d, at 156-157. He concluded that § 3599.09(A) "is not narrowly tailored to serve a compelling state interest and is, therefore, unconstitutional as applied to McIntyre." *Id.,* at 401, 618 N.E.2d, at 159.

Mrs. McIntyre passed away during the pendency of this litigation. Even though the amount in controversy is only $100, petitioner, as the executor of her estate, has pursued her claim in this Court. Our grant of certiorari, 510 U.S. 1108, 114 S.Ct. 1047, 127 L.Ed.2d 370 (1994), reflects our agreement with his appraisal of the importance of the question presented.

II

Ohio maintains that the statute under review is a reasonable regulation of the electoral process. The State does not suggest that all anonymous publications are pernicious or that a statute totally excluding them from the marketplace of ideas would be valid. This is a wise (albeit implicit) concession, for the anonymity of an author is not ordinarily a sufficient reason to exclude her work product from the protections of the First Amendment.

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California,* 362 U.S., at 64, 80 S.Ct., at 538. Great works of literature have frequently been produced by authors writing under assumed names.[4] Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works

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[4] American names such as Mark Twain (Samuel Langhorne Clemens) and O. Henry (William Sydney Porter) come readily to mind. Benjamin Franklin employed numerous different pseudonyms. *See* 2 W. Bruce, Benjamin Franklin Self-Revealed: A Biographical and Critical Study Based Mainly on His Own Writings, ch. 5 (2d ed. 1923). Distinguished French authors such as Voltaire (Francois Marie Arouet) and George Sand (Amandine Aurore Lucie Dupin), and British authors such as George Eliot (Mary Ann Evans), Charles Lamb (sometimes wrote as "Elia"), and Charles Dickens (sometimes wrote as "Boz"), also published under assumed names. Indeed, some believe the works of Shakespeare were actually written by the Earl of Oxford rather than by William Shaksper of Stratford-on-Avon. *See* C. Ogburn, The Mysterious William Shakespeare: The Myth & the Reality (2d ed. 1992); but *see* S. Schoenbaum, Shakespeare's Lives (2d ed. 1991) (adhering to the traditional view that Shaksper was in fact the author). *See also Stevens, The Shakespeare Canon of Statutory Construction*, 140 U.Pa.L.Rev. 1373 (1992) (commenting on the competing theories).

enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.[5] Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

The freedom to publish anonymously extends beyond the literary realm. In *Talley,* the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60, 80 S.Ct. 536. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.,* at 64, 80 S.Ct., at 538. Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were

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[5] Though such a requirement might provide assistance to critics in evaluating the quality and significance of the writing, it is not indispensable. To draw an analogy from a nonliterary context, the now-pervasive practice of grading law school examination papers "blindly" (*i.e.,* under a system in which the professor does not know whose paper she is grading) indicates that such evaluations are possible – indeed, perhaps more reliable – when any bias associated with the author's identity is prescinded.

published under fictitious names. *Id.*, at 64-65, 80 S.Ct., at 538-539. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue v. Gilleo*, 512 U.S. 43, 56, 114 S.Ct. 2038, 2046, 129 L.Ed.2d 36 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity. The specific holding in *Talley* related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes.[6] This tradition is perhaps best

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[6] That tradition is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed "Publius." Publius' opponents, the Anti-Federalists, also tended to publish under pseudonyms: prominent among them were "Cato," believed to be New York Governor George Clinton; "Centinel," probably Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan; "The Federal Farmer," who may have been Richard Henry Lee, a Virginia member of the Continental Congress and a signer of the Declaration of Independence; and "Brutus," who may have been Robert Yates, a New York Supreme Court justice who walked out on the Constitutional Convention. 2 H. Storing, ed., The Complete Anti-Federalist (1981). A forerunner of all of these writers was the pre-Revolutionary War English pamphleteer "Junius," whose true identity remains a mystery. *See* Encyclopedia of

(Continued on following page)

exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.

III

California had defended the Los Angeles ordinance at issue in *Talley* as a law "aimed at providing a way to identify those responsible for fraud, false advertising and libel." 362 U.S., at 64, 80 S.Ct., at 538. We rejected that argument because nothing in the text or legislative history of the ordinance limited its application to those evils.[7] *Ibid.* We then made

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Colonial and Revolutionary America 220 (J. Faragher ed. 1990) (positing that "Junius" may have been Sir Phillip Francis). The "Letters of Junius" were "widely reprinted in colonial newspapers and lent considerable support to the revolutionary cause." *Powell v. McCormack*, 395 U.S. 486, 531, n. 60, 89 S.Ct. 1944, 1969, n. 60, 23 L.Ed.2d 491 (1969).

[7] In his concurring opinion, Justice Harlan added these words:

> "Here the State says that this ordinance is aimed at the prevention of 'fraud, deceit, false advertising, negligent use of words, obscenity, and libel,' in that it will aid in the detection of those responsible for spreading material of that character. But the ordinance is not so limited, and I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, such a generality is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which

(Continued on following page)

clear that we did "not pass on the validity of an *ordinance* limited to prevent these or any other supposed evils." *Ibid.* The Ohio statute likewise contains no language limiting its application to fraudulent, false, or libelous statements; to the extent, therefore, that Ohio seeks to justify § 3599.09(A) as a means to prevent the dissemination of untruths, its defense must fail for the same reason given in *Talley*. As the facts of this case demonstrate, the ordinance plainly applies even when there is no hint of falsity or libel.

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this all-embracing ordinance is likely to have." 362 U.S., at 66-67, 80 S.Ct., at 539-540.

APPENDIX F

IN THE COUNTY COURT OF
ORANGE COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA

VS.

DOUGLAS MICHAEL GUETZLOE

FIRST AMENDED INFORMATION #
48-2006-MM-009313-O

DIVISION – #63

1. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)
2. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)
3. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)
4. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)

5. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)

6. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)

7. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)

8. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)

9. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)

10. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON

ELECTIONEERING COMMUNICATION (M1)

11. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)

12. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)

13. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)

14. FAILURE TO INCLUDE REQUIRED DISCLAIMER ON ELECTIONEERING COMMUNICATION (M1)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

COUNT ONE

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by DONNA MAE COLADO.

COUNT TWO

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida

Statute 106.1439, which was received by ANTOINETTE D. FOLEY.

COUNT THREE

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by RICHARD C. FRAZEE.

COUNT FOUR

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439,

circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by KATHRYN B. GRAMMER.

COUNT FIVE

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by SUZANNE GREEN.

COUNT SIX

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designate (Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006

and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by BARRY E. GREENSTEIN.

COUNT SEVEN

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by KAREN J. JAMES.

COUNT EIGHT

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney,

under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by KENNETH R. MARCHMAN.

COUNT NINE

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by PATRICIA MCDONALD.

COUNT TEN

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the

State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106. 1439, which was received by MARTHA MCHENRY.

COUNT ELEVEN

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by KENNETH F. MURRAH.

COUNT TWELVE

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in

Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by DONALD JAMES PALLADENO.

COUNT THIRTEEN

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by WILLIAM R. ROSENFELT, JR.

COUNT FOURTEEN

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DOUGLAS MICHAEL GUETZLOE, between the 1st day of January, 2006 and the 15th day of March, 2006, in said County and State, did, in violation of Florida Statute 106.1439, circulate an electioneering communication, which failed to include the disclaimers required by Florida Statute 106.1439, which was received by SANDRA S. WOMBLE.

LAWSON LAMAR, State Attorney
Ninth Judicial Circuit of Florida

By /s/ Scott A. Pignone
Scott A. Pignone
Designated Assistant State Attorney
Florida Bar No. 496431

STATE OF FLORIDA
COUNTY OF ORANGE

Personally appeared before me Scott A. Pignone, Assistant State Attorney of the Ninth Judicial Circuit of Florida, who being first duly sworn, says that the allegations set forth in the foregoing INFORMATION are based upon facts that have been sworn to as true, and which if true, would constitute the offense

therein charged, and that he/she institutes this prosecution in good faith.

The foregoing instrument was acknowledged before me this 20th day of September, 2006 by the aforementioned Assistant State Attorney who is personally known to me and who did take said oath.

/s/ Yvette Torres

Notary Seal

APPENDIX G

106.011 Definitions. – As used in this chapter, the following terms have the following meanings unless the context clearly indicates otherwise:

(1)(a) "Political committee" means:

1. A combination of two or more individuals, or a person other than an individual, that, in an aggregate amount in excess of $500 during a single calendar year:

a. Accepts contributions for the purpose of making contributions to any candidate, political committee, committee of continuous existence, or political party;

b. Accepts contributions for the purpose of expressly advocating the election or defeat of a candidate or the passage or defeat of an issue;

c. Makes expenditures that expressly advocate the election or defeat of a candidate or the passage or defeat of an issue; or

d. Makes contributions to a common fund, other than a joint checking account between spouses, from which contributions are made to any candidate, political committee, committee of continuous existence, or political party;

2. The sponsor of a proposed constitutional amendment by initiative who intends to seek the signatures of registered electors.

(b) Notwithstanding paragraph (a), the following entities are not considered political committees for purposes of this chapter:

1. Organizations which are certified by the Department of State as committees of continuous existence pursuant to s. 106.04, national political parties, and the state and county executive committees of political parties regulated by chapter 103.

2. Corporations regulated by chapter 607 or chapter 617 or other business entities formed for purposes other than to support or oppose issues or candidates, if their political activities are limited to contributions to candidates, political parties, or political committees or expenditures in support of or opposition to an issue from corporate or business funds and if no contributions are received by such corporations or business entities.

3. Electioneering communications organizations as defined in subsection (19); however, such organizations shall be required to register with and report expenditures and contributions, including contributions received from committees of continuous existence, to the Division of Elections in the same manner, at the same time, and subject to the same penalties as a political committee supporting or opposing an issue or a legislative candidate, except as otherwise specifically provided in this chapter.

(2) "Committee of continuous existence" means any group, organization, association, or other such entity

which is certified pursuant to the provisions of s. 106.04.

(3) "Contribution" means:

(a) A gift, subscription, conveyance, deposit, loan, payment, or distribution of money or anything of value, including contributions in kind having an attributable monetary value in any form, made for the purpose of influencing the results of an election or making an electioneering communication.

(b) A transfer of funds between political committees, between committees of continuous existence, between electioneering communications organizations, or between any combination of these groups.

(c) The payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to a candidate or political committee without charge to the candidate or committee for such services.

(d) The transfer of funds by a campaign treasurer or deputy campaign treasurer between a primary depository and a separate interest-bearing account or certificate of deposit, and the term includes any interest earned on such account or certificate.

Notwithstanding the foregoing meanings of "contribution," the word shall not be construed to include services, including, but not limited to, legal and accounting services, provided without compensation by individuals volunteering a portion or all of their

time on behalf of a candidate or political committee. This definition shall not be construed to include editorial endorsements.

(4)(a) "Expenditure" means a purchase, payment, distribution, loan, advance, transfer of funds by a campaign treasurer or deputy campaign treasurer between a primary depository and a separate interest-bearing account or certificate of deposit, or gift of money or anything of value made for the purpose of influencing the results of an election or making an electioneering communication. However, "expenditure" does not include a purchase, payment, distribution, loan, advance, or gift of money or anything of value made for the purpose of influencing the results of an election when made by an organization, in existence prior to the time during which a candidate qualifies or an issue is placed on the ballot for that election, for the purpose of printing or distributing such organization's newsletter, containing a statement by such organization in support of or opposition to a candidate or issue, which newsletter is distributed only to members of such organization.

(b) As used in this chapter, an "expenditure" for an electioneering communication is made when the earliest of the following occurs:

1. A person enters into a contract for applicable goods or services;

2. A person makes payment, in whole or in part, for the production or public dissemination of applicable goods or services; or

3. The electioneering communication is publicly disseminated.

(5)(a) "Independent expenditure" means an expenditure by a person for the purpose of expressly advocating the election or defeat of a candidate or the approval or rejection of an issue, which expenditure is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee. An expenditure for such purpose by a person having a contract with the candidate, political committee, or agent of such candidate or committee in a given election period shall not be deemed an independent expenditure.

(b) An expenditure for the purpose of expressly advocating the election or defeat of a candidate which is made by the national, state, or county executive committee of a political party, including any subordinate committee of a national, state, or county committee of a political party, or by any political committee or committee of continuous existence, or any other person, shall not be considered an independent expenditure if the committee or person:

1. Communicates with the candidate, the candidate's campaign, or an agent of the candidate acting on behalf of the candidate, including any pollster, media consultant, advertising agency, vendor, advisor, or staff member, concerning the preparation of, use of, or payment for, the specific expenditure or advertising campaign at issue; or

2. Makes a payment in cooperation, consultation, or concert with, at the request or suggestion of, or pursuant to any general or particular understanding with the candidate, the candidate's campaign, a political committee supporting the candidate, or an agent of the candidate relating to the specific expenditure or advertising campaign at issue; or

3. Makes a payment for the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign material prepared by the candidate, the candidate's campaign, or an agent of the candidate, including any pollster, media consultant, advertising agency, vendor, advisor, or staff member; or

4. Makes a payment based on information about the candidate's plans, projects, or needs communicated to a member of the committee or person by the candidate or an agent of the candidate, provided the committee or person uses the information in any way, in whole or in part, either directly or indirectly, to design, prepare, or pay for the specific expenditure or advertising campaign at issue; or

5. After the last day of qualifying for statewide or legislative office, consults about the candidate's plans, projects, or needs in connection with the candidate's pursuit of election to office and the information is used in any way to plan, create, design, or prepare an independent expenditure or advertising campaign, with:

a. Any officer, director, employee, or agent of a national, state, or county executive committee of a political party that has made or intends to make expenditures in connection with or contributions to the candidate; or

b. Any person whose professional services have been retained by a national, state, or county executive committee of a political party that has made or intends to make expenditures in connection with or contributions to the candidate; or

6. After the last day of qualifying for statewide or legislative office, retains the professional services of any person also providing those services to the candidate in connection with the candidate's pursuit of election to office; or

7. Arranges, coordinates, or directs the expenditure, in any way, with the candidate or an agent of the candidate.

(6) "Election" means any primary election, special primary election, general election, special election, or municipal election held in this state for the purpose of nominating or electing candidates to public office, choosing delegates to the national nominating conventions of political parties, or submitting an issue to the electors for their approval or rejection.

(7) "Issue" means any proposition which is required by the State Constitution, by law or resolution of the Legislature, or by the charter, ordinance, or resolution of any political subdivision of this state to be

submitted to the electors for their approval or rejection at an election, or any proposition for which a petition is circulated in order to have such proposition placed on the ballot at any election.

(8) "Person" means an individual or a corporation, association, firm, partnership, joint venture, joint stock company, club, organization, estate, trust, business trust, syndicate, or other combination of individuals having collective capacity. The term includes a political party, political committee, or committee of continuous existence.

(9) "Campaign treasurer" means an individual appointed by a candidate or political committee as provided in this chapter.

(10) "Public office" means any state, county, municipal, or school or other district office or position which is filled by vote of the electors.

(11) "Campaign fund raiser" means any affair held to raise funds to be used in a campaign for public office.

(12) "Division" means the Division of Elections of the Department of State.

(13) "Communications media" means broadcasting stations, newspapers, magazines, outdoor advertising facilities, printers, direct mail, advertising agencies, the Internet, and telephone companies; but with respect to telephones, an expenditure shall be deemed to be an expenditure for the use of communications media only if made for the costs of telephones, paid

telephonists, or automatic telephone equipment to be used by a candidate or a political committee to communicate with potential voters but excluding any costs of telephones incurred by a volunteer for use of telephones by such volunteer; however, with respect to the Internet, an expenditure shall be deemed an expenditure for use of communications media only if made for the cost of creating or disseminating a message on a computer information system accessible by more than one person but excluding internal communications of a campaign or of any group.

(14) "Filing officer" means the person before whom a candidate qualifies, the agency or officer with whom a political committee registers, or the agency by whom a committee of continuous existence is certified.

(15) "Unopposed candidate" means a candidate for nomination or election to an office who, after the last day on which any person, including a write-in candidate, may qualify, is without opposition in the election at which the office is to be filled or who is without such opposition after such date as a result of any primary election or of withdrawal by other candidates seeking the same office. A candidate is not an unopposed candidate if there is a vacancy to be filled under s. 100.111(4), if there is a legal proceeding pending regarding the right to a ballot position for the office sought by the candidate, or if the candidate is seeking retention as a justice or judge.

(16) "Candidate" means any person to whom any one or more of the following apply:

(a) Any person who seeks to qualify for nomination or election by means of the petitioning process.

(b) Any person who seeks to qualify for election as a write-in candidate.

(c) Any person who receives contributions or makes expenditures, or consents for any other person to receive contributions or make expenditures, with a view to bring about his or her nomination or election to, or retention in, public office.

(d) Any person who appoints a treasurer and designates a primary depository.

(e) Any person who files qualification papers and subscribes to a candidate's oath as required by law. However, this definition does not include any candidate for a political party executive committee.

(17) "Political advertisement" means a paid expression in any communications media prescribed in subsection (13), whether radio, television, newspaper, magazine, periodical, campaign literature, direct mail, or display or by means other than the spoken word in direct conversation, which expressly advocates the election or defeat of a candidate or the approval or rejection of an issue. However, political advertisement does not include:

(a) A statement by an organization, in existence prior to the time during which a candidate qualifies or an issue is placed on the ballot for that election, in support of or opposition to a candidate or issue, in

that organization's newsletter, which newsletter is distributed only to the members of that organization.

(b) Editorial endorsements by any newspaper, radio or television station, or other recognized news medium.

(18)(a) "Electioneering communication" means a paid expression in any communications media prescribed in subsection (13) by means other than the spoken word in direct conversation that:

1. Refers to or depicts a clearly identified candidate for office or contains a clear reference indicating that an issue is to be voted on at an election, without expressly advocating the election or defeat of a candidate or the passage or defeat of an issue.

2. For communications referring to or depicting a clearly identified candidate for office, is targeted to the relevant electorate. A communication is considered targeted if 1,000 or more persons in the geographic area the candidate would represent if elected will receive the communication.

3. For communications containing a clear reference indicating that an issue is to be voted on at an election, is published after the issue is designated a ballot position or 120 days before the date of the election on the issue, whichever occurs first.

(b) The term "electioneering communication" does not include:

1. A statement or depiction by an organization, in existence prior to the time during which a candidate named or depicted qualifies or an issue identified is placed on the ballot for that election, made in that organization's newsletter, which newsletter is distributed only to members of that organization.

2. An editorial endorsement, news story, commentary, or editorial by any newspaper, radio, television station, or other recognized news medium.

3. A communication that constitutes a public debate or forum that includes at least two opposing candidates for an office or one advocate and one opponent of an issue, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum, provided that:

a. The staging organization is either:

(I) A charitable organization that does not make other electioneering communications and does not otherwise support or oppose any political candidate or political party; or

(II) A newspaper, radio station, television station, or other recognized news medium; and

b. The staging organization does not structure the debate to promote or advance one candidate or issue position over another.

(c) For purposes of this chapter, an expenditure made for, or in furtherance of, an electioneering

communication shall not be considered a contribution to or on behalf of any candidate.

(d) For purposes of this chapter, an electioneering communication shall not constitute an independent expenditure nor be subject to the limitations applicable to independent expenditures.

(19) "Electioneering communications organization" means any group, other than a political party, political committee, or committee of continuous existence, whose activities are limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications.

APPENDIX H

106.1439 Electioneering communications; disclaimers. –

(1) Any electioneering communication shall prominently state: "Paid electioneering communication paid for by (Name and address of person paying for the communication)."

(2) Any person who fails to include the disclaimer prescribed in this section in any electioneering communication that is required to contain such disclaimer commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.